

PLR 9345037, 1993 WL 465058 (IRS PLR)

Internal Revenue Service (I.R.S.)

Private Letter Ruling

Issue: November 12, 1993

August 13, 1993

Section 3121 -- Definitions

3121.00-00 Definitions

3121.04-00 Employees

Section 3306 -- Definitions

3306.00-00 Definitions

3306.05-00 Employees

Section 3401 -- Definitions

3401.00-00 Definitions

3401.04-00 Employer-Employee Relationship

CC:EE:3 / TR-31-1217-93

Key

worker = \*\*\*

firm = \*\*\*

Dear Sir or Madam:

This is in response to a request for a ruling submitted by the above-named worker, concerning her federal employment tax status with respect to services she performs for the firm.

The federal employment taxes are those imposed by the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and federal income tax withholding. In cases that involve a possible employer-employee relationship, it is our practice to solicit information from the parties involved. Therefore, we asked the firm for information concerning the worker's services. Because the firm did not respond to our request, we are basing this ruling solely on the information submitted by the worker. According to the information submitted, the firm, an Indian tribal organization, operates a bingo/gambling operation. The worker was engaged to make bingo cards. She performs her services at the firm's location and earns an hourly wage. Either the firm or the worker may terminate the agreement for services at any time without incurring liability. The worker has a continuous relationship with the firm as opposed to a single transaction. She reports daily and works approximately eight hours per day. The firm has the right to change the methods used by the worker and to direct her in how the work is to be done. The firm furnishes the worker with all the necessary tools and materials needed to make the bingo cards.

The worker does not perform similar services for others and does not represent herself to the public as being in business to perform such services. The worker performs her services under the firm's business name and does not have her own shop or office. The worker does not have a financial investment in a business related to the services performed and cannot incur a loss or realize a profit in the performance of her services. [Section 3121\(d\)\(2\) of the Internal Revenue Code](#) defines "employee" as any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

The question of whether an individual is an employee under the common law rules or an independent contractor is one of fact to be determined upon consideration of the facts and the application of the law and regulations in a particular case. Guides for determining the existence of that status are found in three substantially similar sections of the Employment Tax Regulations, namely, sections 31.3121(d)-1, 31.3306(i)-1, and 31.3401(c)-1, relating to the FICA, the FUTA, and federal income tax withholding, respectively.

Section 31.3121(d)-1(c)(2) of the regulations provides that generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he or she has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is the employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor.

In determining whether an individual is an employee under the common law rules, several factors have been identified as indicating whether sufficient control is present to establish an employer-employee relationship. The factors have been developed based on an examination of cases and rulings considering whether an individual is an employee. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. See [Rev. Rul. 87-41, 1987-1 C.B. 296](#).

Consideration must also be given to such factors as the continuity of the relationship and whether or not the individual's services are an integral part of the business of the employer as distinguished from an independent trade or business of the individual himself in which he assumes the risks of realizing a profit or suffering a loss. See [United States v. Silk, 331 U.S. 704 \(1947\)](#), 1947-2 C.B. 167, and [Bartels v. Birmingham, 332 U.S. 126 \(1947\)](#), 1947- 2 C.B. 174.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as partner, coadventurer, agent, independent contractor, or the like.

[Rev. Rul. 56-110, 1956-1 C.B. 488](#), states that where a business enterprise of an Indian tribe was not organized by a specific statutory authorization of the U.S. Congress and is not operated by the Department of the Interior, but was organized and is operated by the tribe itself with the approval and under the supervision and control of the Bureau of Indian Affairs of the Interior Department, such enterprise does not constitute an Instrumentality wholly owned by the United States within the meaning of section 3306(c)(6) of the FUTA. Such an activity is considered a tribal enterprise and services performed in its employ are not excepted from "employment" under such section.

In this case, the worker is given instructions and training by the firm in the way the work is to be done. A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. See, for example, [Rev. Rul. 68-598, 1968-2 C.B. 464](#), and [Rev. Rul. 66-381, 1966-2 C.B. 449](#). Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the

person or persons for whom the services are performed want the services performed in a particular method or manner. See [Rev. Rul. 70-630, 1970-2 C.B. 229](#).

The worker's services are an integral part of the firm's operation. Integration of a worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. See *United States v. Silk*.

The worker has a continuous relationship with the firm as opposed to a single transaction. A continuing relationship between a worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. See *United States v. Silk*.

The worker performs her services at the firm's location. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. See [Rev. Rul. 56-660, 1956-2 C.B. 693](#).

The worker is paid an hourly wage. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor. See [Rev. Rul. 74-389, 1974-2 C.B. 330](#).

The firm furnishes the worker with all the necessary tools and materials needed to perform her services. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. See [Rev. Rul. 71-524, 1971-2 C.B. 346](#).

The worker does not have a financial investment in the facilities used. If a worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. See [Rev. Rul. 71-524](#).

The worker cannot incur a profit or suffer a loss as a result of her services. A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. See [Rev. Rul. 70-309, 1970-1 C.B. 199](#).

Either the firm or the worker may terminate the agreement for services at any time without incurring liability. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. See [Rev. Rul. 75-41, 1975-1 C.B. 323](#). If a worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. See [Rev. Rul. 70-309](#).

Careful consideration has been given to the information submitted in this case. Based on the law, regulations, court cases, and revenue rulings, we conclude that the worker is an employee of the firm for purposes of the FICA, the FUTA, and Federal income tax withholding. As a general rule, the federal employment taxes, including income tax withholding, apply with regard to all wages paid in employment, unless there is a specific exception. There is no exception for services performed for an Indian tribe. Section 7871 of the Code provides that an Indian tribal government shall be treated as a State for certain specific purposes, including, for example, charitable contributions under section 170, tax deductions under section 164, etc. Sections of the Code dealing with FICA, FUTA, and income tax withholding are not listed. Generally speaking, Indian tribes and their tribal activities are not political subdivisions or agencies of a state for federal employment tax purposes. For both FICA and FUTA taxes, as well as income tax

withholding, Indian tribes are treated in the same way as private employers. This ruling applies to any other individuals engaged by the firm under similar circumstances. Copies of this ruling are being furnished to the worker and to the local IRS District Director's office.

This ruling is directed only to the taxpayer to whom it is addressed. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.

Sincerely yours,

RONALD L. MOORE  
Technical Assistant  
Office of the Associate Chief Counsel  
(Employee Benefits and Exempt Organizations)  
Enclosure:  
Copy for section 6110 purposes

This document may not be used or cited as precedent. [Section 6110\(j\)\(3\) of the Internal Revenue Code](#).

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